

Is there a place for the Islamic veil in the workplace? Managerial prerogatives and the duty of reasonable accommodation in the EU anti-discrimination governance

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Abstract This article analyses whether an employer may justify a ban on religious symbols because of economic interests, such as the protection of a company's image or customer preference. It explains the concept of managerial authority and conditions under which economic interests must yield to the principle of non-discrimination. It also suggests a method of aligning the duty of accommodation in the justification of derogations to non-discrimination. It posits that the employer needs to demonstrate that accommodating religion in a particular post or position would impose a disproportionate economic burden on the company. It concludes that the Islamic veil controversy demonstrates a need for tailor-made solutions in the private employment context and a shift from norm compliance to anti-discrimination governance.

Keywords Fundamental rights and freedoms · Anti-discrimination governance · Duty of reasonable accommodation · Managerial prerogatives · Islamic veil

1 Introduction

The Islamic veil controversy¹ before the CJEU is a test case for the European Union's human rights regime. It is particularly topical now, when right-wing nationalism and

¹The term “Islamic veil” is hereafter used to mean all types of Muslim headgear for women, notwithstanding differences among them which may be relevant in the workplace. Further see *Brems* [6] and *Howard* [12].

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anti-immigrant sentiment are growing in Europe, and the Union needs to strengthen its unity, core values, and identity. The two preliminary references submitted by the Belgian and the French highest courts inquire whether a ban on wearing religious symbols at work contravenes EU anti-discrimination law.² What they essentially question is the place of religion in the European public space. Yet, the CJEU decisions on this matter will be more than “symbolic” because of their practical implications for corporate governance and social integration of minority women through employment.

This article addresses only one aspect of the Islamic veil debate. It analyses whether a ban on religious symbols in the workplace may be justified by the economic interests of the employer. It argues that the principle of non-discrimination as a general principle of EU law implies a fundamental right not to be subject to discrimination (hereafter, the right to non-discrimination)³ which may come into conflict with the protection of other fundamental rights and freedoms. It claims that the right to non-discrimination is not absolute,⁴ but needs to be balanced against other principles and values recognized by the EU treaty law.⁵

This article suggests that non-discrimination can be reconciled with the protection of economic freedoms, notwithstanding the inherent tension between the Union’s objectives laid down in to Art. 3(3) TEU.⁶ Although EU anti-discrimination law is shaped by the distinction between direct and indirect discrimination, these concepts denote concrete subjective rights which need to be seen as legislative concretisations of the fundamental right to non-discrimination.⁷ Therefore, both the right not to be subject to direct discrimination and the right not to be subject to indirect discrimination may be limited, albeit they differ in the scope of permissible justifications.

²Case C-157/15 *Samira Achbita*, referred by the Belgian Court of Cassation, and C-188/15 *Boungaoui and ADDH*, referred by the French Court of Cassation.

³Equality is recognised as a general principle of EU law, while the prohibition of discrimination is stipulated in Art. 21 of the Charter of Fundamental Rights of the European Union. Although a more detailed analysis of the relationship between Charter principles and rights goes beyond the scope of this article, it is further assumed that the prohibition of discrimination arises from the general principle of equality and entails an individual right not to be subject to discrimination on any prohibited ground. Therefore, the right to non-discrimination is a self-standing fundamental right, which is not ancillary to other fundamental rights.

⁴Following Robert Alexy’s theory of constitutional rights, the right not to be subject to discrimination forms an abstract *prima facie* right – the right to the omission of differential treatment. See Alexy [2], p. 287.

⁵This article uses the term “principle” and “right” interchangeably. Therefore, the principle of non-discrimination and the right to non-discrimination share the same meaning.

⁶The EU shall combat social exclusion and discrimination, while remaining a competitive economy. The notion of a competitive social economy introduced in Art. 3(3) TUE is an attempt to reconcile the seemingly opposite ideals of competitiveness and social justice based on equality. In practice, equality may be seen as a condition of competitiveness.

⁷According to Alexy’s theory of rights, the right not to be subject to direct discrimination and the right not to be subject to indirect discrimination correspond with the notion of concrete equality rights pertaining to the negative status.

The CJEU decisions on the Islamic veil will be first to address the issue of discrimination with regard to religion in the light of the EU anti-discrimination directives.⁸ It is expected that the CJEU will explain whether private employers may justify a refusal to employ certain persons due to economic reasons related to the protection of the company's image or customer preference. It will also indicate factors to be taken into account by domestic courts in the assessment of company policies that have discriminatory effects on individuals who wish to manifest their faith in public.

The article argues that the Islamic veil controversy provides the CJEU with an opportunity to adopt a more robust interpretation of the principle of non-discrimination. It suggests that the prohibition of discrimination entails positive obligations which include reasonable accommodation. It also proposes a method of aligning the duty to accommodate with the duty to justify unequal treatment. This method requires showing that a request for accommodation was adequately considered by the employer and rejected due to disproportionate costs for the company rather than mere inconvenience. Such an approach seems to strengthen the value of diversity in the workplace while allowing business entities to defend their policies on economic grounds. The article concludes that economic efficiency and diversity are the fundamentals of the EU anti-discrimination governance which shifts from norm compliance to management.

2 Striking a balance between non-discrimination and freedom to conduct a business

The Islamic veil ban at the workplace requires striking a balance between non-discrimination and freedom to conduct a business. In this case the Union's primary commitment to non-discrimination is confronted with the protection of economic freedoms and property rights of business owners. The prohibition of discrimination may therefore interfere with fundamental economic freedoms, to the extent it introduces restrictions on freedom of contract and freedom to act upon one's preference or customer preference. In this view, EU anti-discrimination law appears as a type of social legislation which corrects market choices.⁹

In essence, the principle of non-discrimination challenges the main tenet of the ne-liberal ideology underpinning the EU economic integration project. Not only does it undermine the assumption about the rationality of market users, but also imposes costs on business entities.¹⁰ As a result, the prohibition of discrimination limits the freedom to conduct business,¹¹ and can be "rationally" defied by private companies

⁸Directives adopted in pursuance to Art. 13 TEC (currently Art. 19(1) TFEU). See also the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426.

⁹Competitive markets do not discourage discriminatory practices unless prompted to do so. Therefore, the prohibition of discrimination is not limited to sectors which are immune to competitive pressures, like the unionised industry or public service. *Epstein* [9], pp. 165–75.

¹⁰The failure to discriminate operates as a tax imposed on the employer's business, while a non-discriminatory treatment is a self-imposed tax due to co-workers or customer reactions. *Sunstein* [23], p. 2415.

¹¹Art. 16 CFR.

who are profit-maximisers. Nevertheless, the principle of non-discrimination can be defended from a macroeconomic perspective because it helps to correct market failures.¹² It is common sense that anti-discrimination laws generate more social benefits than costs, especially if one considers the moral costs of discrimination.¹³

Although the original function of anti-discrimination law is to facilitate market access, it also pursues an ambitious social goal.¹⁴ It aims to transform the existing social structures, as well as human conduct and motivations.¹⁵ Moreover, the principle of non-discrimination serves redistribution and de-commodification of resources,¹⁶ while the costs of implementing this social agenda are shared among market participants. For this reason alone, it shall come as no surprise that business owners try to protect their economic interests against the excessive costs of compliance with the principle of non-discrimination.

The economic interests of business owners are protected under the concept of managerial authority – this means that the management of a business has certain expressed or implied rights to shape the company's image and adopt policies in line with customer preference.¹⁷ The prohibition of discrimination substantially diminishes the managerial prerogatives because it is not a default position that can be contracted out, even if it means losing the good name or reputation of the business.¹⁸ Therefore, the main challenge of anti-discrimination law is to give an adequate account of the managerial authority of private employers or service providers, while ensuring an effective protection against discrimination.

Although EU treaty law does not provide for the lexical priority of the principle of non-discrimination, there is a shared consensus that economic rights and freedoms are subject to more far-reaching limitations than other fundamental rights, while the protection of private property implies certain obligations towards the general public.¹⁹ Moreover, “the protection of the right to property guaranteed under EU law, as now established in Art. 17 of the Charter of Fundamental Rights, does not apply to

¹²For as long as there are free riders and high bargaining costs, the free market cannot by itself maximise wealth.

¹³From the individual perspective “discrimination has both a financial impact (because it may touch on a person's ability to earn a living in the employment market) and a moral impact (because it may affect that person's autonomy).” Opinion of AG Sharpston of 13 July 2016, Case C-188/15 *Asma Bougnaoui and ADDH*, ECLI:EU:C:2016:553, para. 72. See also i.e. *Donoghue* [5].

¹⁴The social agenda of anti-discrimination reveals the normative deficiency of anti-discrimination laws which “persists in the form of managerial euphemisms as to how the influence of pervasive bias might be mitigated through the moral re-engineering of individual minds.” *Somek* [20], p. 177.

¹⁵Although anti-discrimination law helps to establish equal opportunities, it hardly disestablishes the existing social inequalities and hierarchies.

¹⁶*Somek* [20], p. 137.

¹⁷*Oldham* [17], p. 545.

¹⁸*Alexander* [1], p. 199 (“Many employers in choosing employees would be quite willing to overlook immoral consumer reactions if assured that their competitors would also do so. The consumers, if faced with the choice between foregoing the service and dealing with the employees against whom they are biased, might all choose the later course of action. In such a case, no employer would lose any profits if all employers joined in or were forced into refraining from catering to consumer biases.”)

¹⁹See i.e. Art. 14(2) of the German Basic Law. See also *Golay/Cismas* [7].

mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity.”²⁰

Nevertheless, the protection against discrimination should not go as far as to deprive property and business owners of the core of their rights.²¹ The fundamental character of economic freedoms in the EU legal order suggests that some managerial decisions should be taken seriously, even at the cost of limiting the principle of non-discrimination. Therefore, the prohibition of discrimination should be subject to derogations which allow companies to maintain their essential functions.²²

Reconciling interests of the employer with the individual protection requires striking a fair balance between the fundamental right not to be subject to discrimination (qualified as the right not to be discriminated against on the basis of a prohibited ground without an objective justification) and the freedom to conduct a business. Although the outcome of this balance will be always context-specific, given the importance of such factors like the character and size of business or industry, it needs to be acknowledged that business owners have a legitimate interest to claim exemptions from the prohibition of discrimination. Nevertheless, the scope of managerial derogations should be narrowly construed, especially taking into account the structural nature of discrimination and the unequal bargaining position of potential employees in absence of a strong protection of their rights.

3 The prohibition of religious discrimination and the public/private divide

The place of religion in the European public space varies across Member States due to their constitutional traditions and the models of state-church relationships.²³ Domestic courts understand and apply the principle of state neutrality and the concept of public service in different ways, and there are no common European standards regarding the place of religious symbols in public schools and administration.²⁴ In turn, the differences in national laws and practice of state-church relationships have led the

²⁰Opinion of AG Kokott of 19 March 2015, Case C-398/13 P *Inuit Tapiriit Kanatami and Others v European Commission and Others*, ECLI:EU:C:2015:190, paras. 74–75. Similarly, according to the ECtHR case-law, the right to protection of property enshrined in Art. 1 of the Protocol 1 does not encompass the protection of mere earning prospects.

²¹Art. 52(1) CFR, first sentence.

²²Art. 5 of the Directive 2000/78/EC provides that the prohibition of discrimination applies without prejudice to measures laid down by national laws, which are necessary in a democratic society for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and rights and freedoms of others.

²³For the overview of law and practice in the Member States of the Council of Europe with regard to the presence of religious symbols in state schools – see *Lautsi v. Italy*, no. 30814/06, judgment of 18 March 2011, paras. 26–28. The Islamic veil controversy has been taken up by many constitutional courts – i.e. the German Federal Constitutional Court, decision of 27 January 2015, 1 BvR 471/10; the French Constitutional Council, decision of 7 October 2010, no. 2010-613 DC; the Belgian Constitutional Court, judgment of 6 December 2012, B.29.1; the Spanish Supreme Court, judgment of 6 February 2013, no. 693/2013, appeal no. 4118/2011.

²⁴*Sahin v. Turkey*, no. 44774/98, judgment of 10 November 2005. The Grand Chamber emphasised that “[i]t is not possible to discern throughout Europe a uniform conception of the significance of religion in

ECtHR to the conclusion that there is no European consensus on this matter.²⁵ As a consequence, the ECtHR granted national authorities a wide margin of appreciation with respect to the principles governing the public service,²⁶ the school system and curriculum,²⁷ and even peaceful social co-existence.²⁸ Still, national authorities enjoy far less discretion in cases concerning the manifestation of one's religious views in public.²⁹

Overall, the case-law developed by the ECtRH and domestic courts with regard to freedom of religion and the prohibition of religious discrimination demonstrates that there are important differences between public sector and private sector employment.³⁰ It is also evident that the specific features of public service may justify limitations imposed on public servants or users of public services that do not apply to other contexts (like private employment). Therefore, it is pertinent to ask what specific features of public service warrant a derogation from the prohibition of discrimination on the ground of religion – or more precisely, on the manifestation of religious beliefs.

While the EU Charter of Fundamental Rights recognises the freedom of religion and non-discrimination on the ground of religion,³¹ Directive 2000/78/EC expressly prohibits discrimination with regard to religion both in public and private sectors, including public bodies.³² Although the principle of non-discrimination shall be effectively protected at the EU and the national levels, the right to non-discrimination arising from the prohibition of discrimination is not absolute and must be reconciled with the protection of other fundamental principles or values enshrined in EU treaties.

society (...), and the meaning or impact of the public expression of a religious belief will differ according to time and context (...). Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order (...). Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context (...)," para. 109.

²⁵The consensus doctrine developed by the ECtHR, coupled with the margin of appreciation, poses a serious risk to international minority protection since it thus defers to the decisions of national authorities which usually do not represent minority values. *Benvenuti* [4], p. 850.

²⁶*Dahlab v. Switzerland*, no. 42393/98, decision of 15 February 2001; *Kurtulmus v. Turkey*, no. 65500/01, decision of 24 January 2006, *Ebrahimian v. France*, no. 64846/11, judgment of 26 November 2015.

²⁷*Aktas and Others v. France*, no. 43563/08, decision of 30 June 2009, *Dogru v. France*, no. 27058/05, judgment of 4 December 2008, *Sahin v Turkey*, no. 13279/05, judgment of 20 October 2011.

²⁸*S.A.S. v. France*; no. 43835/11, judgment of 26 June 2014; *Belkacemi v. Oussar v. Belgium*, no. 37798/13.

²⁹In *Ahmed Arslan and Others v. Turkey*, no. 41135/98, judgment of 23 February 2010, the ECtHR held that wearing a religious garment in public by private individuals does not threaten public order, in particular if there is no evidence of engaging in proselytism. In comparison, in *S.A.S. v. France*, no. 43835/11, judgment of 1 July 2014, the Court found that the full-face ban applicable to all public places except places of worship does not violate freedom of religion. Yet, the important factor in this case was that the ban concerned only a full-face cover and did not affect women wearing other types of Islamic headgear.

³⁰See also Opinion of AG Kokott of 31 May 2016, Case C-157/15 *Samira Achbita*, para. 6 ("[t]he working conditions applicable to public-sector employees (such as in schools, administrative authorities and courts, as well as in private undertaking entrusted with the provision of public services) may be distinguished by certain special features.")

³¹Art. 10 CFR and Art. 21 CFR.

³²Art. 3(1) of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2 December 2000, pp. 16–22.

In particular, the right to non-discrimination may come into conflict with the obligation to respect the national identity of Member States, inherent in their fundamental political and constitutional structures.³³

In order to protect their national identity Member States can claim a derogation from the uniform application of the principle of non-discrimination to public service. More specifically, they can claim that the principle of non-discrimination clashes with the principle of secularism which constitutes a distinctive feature of their public service tradition.³⁴ It follows that the national identity exception to the prohibition of discrimination with regard to religion can be granted upon showing that the constitution of a Member State endorses the principle of secularism (*laïcité*) and that secularism is a distinctive feature of the public service tradition. In this regard, the CJEU shall retain its authority to review whether such derogation does not go beyond what it is necessary to protect the national identity of a Member State.

Clearly, the national identity exception rests on the public policy argument which has been already effectively used to justify derogations from fundamental freedoms.³⁵ It is also confirmed in the limitation clause contained in the Charter that all fundamental rights and freedoms may be subject to limitations provided that they are necessary and genuinely meet the objectives recognized by the Union.³⁶ Furthermore, Directive 2000/78/EC recognises limitations based on public policy grounds when they are laid down by national law.³⁷

Still, it should be noted that the national identity exception applied in the context of EU anti-discrimination law has much wider implications than derogations from freedom of movement established in the *Omega* case, in particular if one compares their potential scope of application. Since the national identity exception to the prohibition of discrimination with regard to religion may apply to the entire public sector employment in Belgium or France,³⁸ it may significantly diminish the prospects for social integration of minority groups in these Member States.³⁹

³³ Art. 4(2) TEU.

³⁴ See the opinion of AG Kokott in *Achbita*, para. 32 (“National identity does not therefore limit the scope of the Directive as such, but must be duly taken into account in the interpretation of the principle of equal treatment which it contains and of the grounds of justification for any differences of treatment.”)

³⁵ Compare Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] ECR I-13693. (“The Court has repeatedly noted that the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Union institutions (see Case C-36/02 *Omega* [2004] ECR I-9609, para. 30, and Case C-33/07 *Jipa* [2008] ECR I-5157, para. 23). Thus, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (see *Omega*, para. 30 and the case law cited”).)

³⁶ Art. 52(1) CFR.

³⁷ Art. 2(5) Directive 2000/78/EC (“This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.”)

³⁸ Consider for example the opinion of the French Court of Cassation which held that the principles of neutrality and secularism apply to all *public services*, including when they are provided by private bodies exercising public functions and subject to specific constraints resulting from the fact that they participate in a public service mission. Cass., soc., 19 mars 2013, no. 12-11.690.

³⁹ See *Brems* [5].

The second derogation is not country-specific. It can be applied even in Member States which endorse religious symbols in public space and therefore may not claim derogations from the principle of non-discrimination on national identity grounds. This second derogation is applicable only to certain positions within public service for which the neutral image constitutes a specific job requirement. In this regard, the public service exception to the principle of non-discrimination follow derogations from the freedom of movement for workers set out in pursuance to the treaty law⁴⁰ and the case-law recognising the special status of public officials who hold “posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities.”⁴¹

In this vein, it could be argued that certain posts in public service are involved directly or indirectly in the exercise of public authority and imply a higher standard of neutrality than other posts. As a consequence, some public officials must entirely refrain from public manifestations of their political, ideological or religious views. The public service exception as applied to distinctive posts within public service justify derogations based on the specific job requirements. The same argument regarding specific job requirements can be invoked in the private sector employment. However, in the private sector context, the protection of neutrality does not have the same tradition like in the public service. Instead in the private sector employment the dominant principle is the principle of efficiency which only in rare situations may imply the worldview neutrality.

4 The concept of managerial prerogatives

The notion of the managerial authority was developed by Robert Post with regard to the government powers in the administration of “organizational domains dedicated to instrumental conduct.”⁴² The concept was used to justify specific limitations imposed on public servants with regard to freedom of speech⁴³ and contrasted with the governance authority regarding the general citizenry.⁴⁴ The notion of managerial

⁴⁰Currently Art. 45 (4) TFUE.

⁴¹C-149/79 *Commission v Belgium* [1980] ECR 3881, paras. 10 and 11. The European Commission also urged Member States to exclude from the definition of public services posts that might have a commercial character. See Communication 88/C 72/02: Freedom of movement of workers and access to employment in the public service of the Member States - Commission action in respect of the application of Art. 48(4) of the EEC Treaty (OJ C 72 of 18 March 1988, p. 2) (listing “bodies responsible for administering commercial services, such as public transport, supply of electricity and gas, airlines and shipping lines, posts and telecommunications, radio and television companies, and in public health care services, state education and research for non-military purposes conducted in public establishments”).

⁴²*Post* [18], p. 200.

⁴³Note that in some contexts wearing of religious apparel could be considered as a form of symbolic speech.

⁴⁴For Post, the distinction between the managerial and governance authority is founded on the concept of public forum and serves to explain the scope of protection of free speech. While the public forum was traditionally conceived as a place designed for “uninhibited, robust and wide-open speech on public issues” [*New York Times v. Sullivan*, 376 U.S. 254 (1964)], the non-public forum was linked to the government

authority implies that the government possesses special prerogatives which justify broader restrictions of fundamental rights than applicable to individuals outside the government *largess*.⁴⁵ Moreover, the government acting in its employer's capacity has prerogatives that go beyond the usual powers of private employers.⁴⁶

The concept of managerial authority is also used to justify actions undertaken to protect economic interests of private companies.⁴⁷ In corporate governance, the managerial authority denotes special rights of company owners to determine conditions of their business transactions and employment relationships. Private sector employers use managerial prerogatives to set out business strategies, internal policies, and working conditions. Since non-discrimination sets a limit on the exercise of the managerial authority employers may claim derogations from the prohibition of discrimination to protect their managerial authority.⁴⁸

Still, the managerial authority should not give business owners a *carte blanche* to impose burdens which only potentially serve the interest of business efficiency or advance other institutional objectives.⁴⁹ Instead, they need to be closely linked with the specific job requirements or business necessity.⁵⁰ Therefore, a company may legitimately promote its neutral image or policies catering to customer preference but in order to be exempted from the prohibition of discrimination the employer must be able to justify these policies.⁵¹ Moreover, the scope of such derogation depends on whether a particular job or business essentially requires a neutral image or customer preference for a neutral brand.⁵²

property and not opened to the public for expressive purposes. In result, the government restriction of speech in the non-public forum was subject to the lowest judicial scrutiny. See *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

⁴⁵ *Morris* [16], p. 442.

⁴⁶ *Fredman/Morris* [10], p. 6 (“There are five distinctive features which set the State apart from other employers. First, the State has the powers to initiate legislation and to govern. Secondly, it derives its revenue from taxation, and not primarily from the output of its employers. Thirdly, it is able to justify its actions on the grounds of the ‘national interest’, and this is used to legitimate restrictions on the personal lives of employees. Fourthly, the State is subject, at least in theory, to constitutional constraints not shared by private employers. Fifthly, State employment is bureaucratic in structure.”)

⁴⁷ *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

⁴⁸ The effective exercise of the managerial authority could be therefore viewed as a legitimate aim justifying a discriminatory practice. It does generally correspond with the protection of rights and freedoms of others – Art. 2(5) of the Directive 2000/78/EC.

⁴⁹ Still, the scope of managerial prerogatives is a disputable issue. For example, the US Supreme Court held that anti-discrimination laws, such as the Age Discrimination Act of 1965, “does not constrain employers from exercising significant other prerogatives and discretions in the usual course of hiring, promoting, and discharging employees” [*McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995)]. Similarly, in *Price Waterhouse v. Hopkins* [at 239] the Supreme Court confirmed that “Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers’ freedom of choice.”

⁵⁰ In France and Germany, customer relationship may be a ground for a restriction of religious freedom only where the employers can establish harm to the business. See i.e. CA de Paris, 19 June 2003, No. 03-30.212 and 10 October 2002, 2 AZR 472/01.

⁵¹ See i.e. *Hepple* [15], pp. 22–23.

⁵² Paradoxically, this is the flip side of the argument successfully used in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. (1995). In this decision the Supreme Court held that “any suggestion that for-profit corporations are incapable of exercising religion because their purpose is simply to make money flies in the face

4.1 Distinction between direct and indirect discrimination

The distinction between direct and indirect discrimination in EU law is very perplexing. It requires a prior determination of whether a measure is directly or indirectly linked to a protected category. As a matter of fact, the approach of national authorities to this distinction is not uniform. Moreover, national laws implementing the EU anti-discrimination directives differ on the question whether direct discrimination is justifiable. As the two preliminary references regarding the veil controversy show, similar circumstances are often interpreted differently even within one jurisdiction. Nevertheless, this problem may not appear at the national level or before the European Court of Human Rights, where a veil ban is primarily considered as an infringement of freedom of religion rather than a case of discrimination.⁵³

The EU anti-discrimination directives explicitly prohibit both direct and indirect discrimination. Direct discrimination occurs where one person is treated less favourably on the prohibited ground like nationality, gender, racial or ethnic origin, religion, sexual orientation, age or disability than another is, has been or would be treated in a comparable situation.⁵⁴ It means that less favourable treatment on these grounds is prohibited unless (1) it is not less favourable, or (2) it falls in the scope of a derogation.

The EU anti-discrimination directives provide four types of derogations regarding (1) genuine and determining occupational requirements,⁵⁵ (2) religious institutions,⁵⁶ (3) positive actions,⁵⁷ (4) age discrimination.⁵⁸ Moreover, Directive 2000/78/EC recognises national laws designed to ensure the operational capacity of the armed forces and the police, prison or emergency services.⁵⁹ Additionally, Member States may choose not to apply the provisions of this Directive with regard to disability and age discrimination to all or part of their armed forces in order to safeguard their combat effectiveness.⁶⁰ In its remaining scope, the prohibition against direct discrimination under the EU regime does not yield to any justifications.⁶¹

By contrast, indirect discrimination occurs when an apparently neutral provision, criterion or practice has a discriminatory effect on a protected category compared

of modern corporate law. States, including those in which the plaintiff corporations were incorporated, authorize corporations to pursue any lawful purpose or business, including the pursuit of profit in conformity with the owners' religious principles."

⁵³ It is also noted that a national court may review "the headscarf prohibition as an indirect discrimination, even though it does not explicitly state so." *Mahlmann* [15], p. 1106.

⁵⁴ See the analogous provisions of the EU anti-discrimination directives (i.e. Art. 2(1)(a) of the Directives 2000/78/EC, 2000/43/EC, 2004/13/EC, 2006/54/EC).

⁵⁵ Art. 14(2) of the Directive 2006/54/EC and Art. 4(1) of the Directive 2000/78/EC.

⁵⁶ Art. 4(2) and (3) of the Directive 2000/78/EC.

⁵⁷ Art. 3 of the Directive 2006/54/EC and Art. 7 of the Directive 2000/78/EC.

⁵⁸ Art. 6 of the Directive 2000/78/EC.

⁵⁹ Recital 18 of the Directive 2000/78/EC.

⁶⁰ Recital 19 of the Directive 2000/78/EC.

⁶¹ Opinion of AG Sharpston, paras. 63–67.

with other persons unless it can be objectively justified.⁶² An objective justification requires showing that unequal treatment serves a legitimate interest and is appropriate and necessary. The conditions of appropriateness and necessity follow the standard proportionality test, which implies that a measure is appropriate and necessary when there are no other appropriate and less restrictive measures to achieve the aim, and the disadvantages caused are not disproportionate to the objectives thereby pursued. In this context, it is for the national court to determine whether there are other appropriate and less restrictive means enabling the aims to be achieved.

In the light of this distinction, there are two possible ways to claim derogations from the principle of non-discrimination in private sector employment. When the employer adopts a policy that excludes persons belonging to a protected category for the very fact of belonging to such category,⁶³ it is a case of direct discrimination. In this case, the only possible defence is to claim that a prohibited ground constitutes a genuine and determining occupational requirement (unless the employer is not a church or religious institution to which Art. 4(2) and (3) applies). When the employer does not take any of the protected grounds as a proxy for unequal treatment, but nevertheless puts persons belonging to a protected category at a particular disadvantage compared with other persons, the case may involve indirect discrimination. In this case, the employer should demonstrate that the policy serves a legitimate job-related interest and is proportionate.

4.2 Protecting the company's image and catering to customer preference

The question whether the promotion of the company's image and catering to customer preference warrants a derogation from the prohibition of discrimination with regard to religion is central to the Islamic veil controversy before the CJEU. At first, the distinction between direct and indirect discrimination in this context seems secondary since the justification based on occupational requirements or a neutral policy in case of indirect discrimination triggers the same proportionality analysis. In both cases, the employer needs to show that a measure serves a legitimate interest and is proportionate. Still, in case of occupational qualifications, the scope of permissible justifications is narrower than in case of indirect discrimination. In the words of Art. 4(1) of Directive 2000/78/EC, the genuine and determining occupational requirement should be closely related to the nature of the particular occupational activities or the context in which they are carried out.⁶⁴

The preliminary question presented in *Bouagnaoui* is whether a requirement not to wear the religious clothing is capable of constituting an occupational requirement

⁶² See the analogous provisions of the EU anti-discrimination directives (i.e. Art. 2(1)(b) of the Directives 2000/78/EC, 2000/43/EC, 2004/13/EC, 2006/54/EC).

⁶³ Opinion of AG Kokott in *Achbita*, para. 45 (explaining that direct discrimination occurs when unequal treatment is inseparably linked to the protected ground – it occurs on account of the specific characteristics, even if they are not immutable but based on subjective convictions.)

⁶⁴ Art. 2(2) of Directive 76/207/EEC, OJ L 39 of 14 February 1976, pp. 40–42. See also Case C-273/97 *Sidar* [1999] ECR I-7403, Case C-285/98 *Kreil* [2000] ECR I-69 and cases related to the specific job requirements related to age – C-447/09 *Prigge and Others* [2011] ECR I-8003; C-416/13 *Vital Perez*, ECLI:EU:C:2014:2371.

in the meaning of Art. 4(1) of Directive 2000/78/EC.⁶⁵ To answer this question, the CJEU needs to determine under which circumstances pertaining to the private sector employment an occupational requirement related to religion is “genuine and determining.”⁶⁶ Notably, in the case at hand the policy was defined in a negative way and related to the context of carrying out the occupational activities rather than their nature. The employer required that a person who qualifies for the position of a design engineer shall not possess any particular characteristics related to religion. More precisely, such person shall not undertake a particular conduct related to religion when in contact with customers.

The CJEU considered a similar “job specification” as a potential case of discrimination with regard to ethnicity in *Feryn*.⁶⁷ It held that even mere speech may constitute an act of direct discrimination.⁶⁸ Hence, a company owner who publicly declared he would not recruit Moroccans could not claim that ethnic origin – or precisely, the fact of not belonging to a particular ethnic group – is a genuine and determining occupational qualification.⁶⁹ The company could not refer to customer preference even if the service was directly related to their home and privacy.⁷⁰ Instead, the only permissible defence was to prove that the undertaking’s actual recruitment practice did not correspond to the discriminatory statements.

⁶⁵ See the Recital 23 of the Preamble and Art. 4 (1) Directive 2000/78 (“Member States may provide that a difference of treatment which is based on a characteristic related to any of the [prohibited] grounds (...) shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate”). It is moreover required that Member States would notify circumstances to which this exception should apply.

⁶⁶ In the earlier case law, the CJEU stressed that “it is not the ground on which the difference of treatment is based but a characteristic related to that ground which must constitute a genuine and determining occupational requirement.” C-229/08 *Wolf* [2010] ECR I-00001, para. 35.

⁶⁷ C-54/07 *Firma Feryn NV* [2008] ECR I-5187.

⁶⁸ *Feryn*, para. 25 (“The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43.”)

⁶⁹ In the same line, the US Equal Employment Opportunity Commission stated that “the refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers” does not trigger the bona fide occupational qualification exception (29 C.F.R. § 1604.2(a)(1)(iii), (a)(2)(z) (1975)). Therefore, customer preference may not serve as a legitimate justification for direct discrimination with regard to race or religion. The case of sex discrimination in this regard is more complex. See also AG Kokott’s opinion in *Achbita*, para. 91 (arguing that in narrowly defined situations customers or service users may demand contact with a person of a particular gender.)

⁷⁰ *Firma Feryn* specialised in the sale and installation of doors and the director of Feryn stated that ‘immigrants’ would not be recruited for the position of door fitters because its customers were reluctant to give them access to their private residences for the period of the works. His public statements are clearly motivated by economic reasons, rather by personal discriminatory intent. He said: “I must comply with my customers’ requirements. If you say ‘I want that particular product or I want it like this and like that’, and I say ‘I’m not doing it, I’ll send those people’, then you say ‘I don’t need that door’. Then I’m putting myself out of business. We must meet the customers’ requirements. This isn’t my problem. I didn’t create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? – I must do it the way the customer wants it done!?”

It follows that a company may not openly declare that the recruitment policy is based on discriminatory preferences of its customers. Yet, it may still argue that certain job requirements are necessary to maintain its business operations.⁷¹ In limited circumstances, it is plausible that the employer justifies its recruitment policy on the ground that a discriminatory practice is necessary for maintaining the company's image as a market brand. In such circumstances, a *bona fide* discriminatory practice needs to be essential for the company's image. In this line, it could be further argued that it would be too costly for a company to forego discrimination mandated by the customer preference for a brand. Nevertheless, it seems that such argumentation is plausible only with regard to sex.⁷²

The above considerations are nonetheless central to the question referred by the Belgian Court of Cassation which inquires as to whether a company policy banning any visible manifestations of religious views at workplace amounts to discrimination with regard to religion. Although the preliminary reference suggests that such practice amounts to direct discrimination, it concerns unequal treatment which does not single out any religion, but introduces a neutral dress code.⁷³ This is therefore a neutral grooming policy which puts Muslim women at a particular disadvantage compared to other persons.⁷⁴ In this case, the CJEU needs to determine whether a company may legitimately invoke its neutral image as an objective and reasonable justification for unequal treatment with regard to religion.⁷⁵

Notably, the ECtHR addressed a similar question in *Eweida and Others v. the United Kingdom*.⁷⁶ In *Eweida*, a private company, British Airways, adopted a dress code which banned any visible religious symbols. Mrs. Eweida is a Christian and she insisted on wearing a cross at work. She was first sent home without pay and then offered another post for which it was not required to wear a uniform. It is important to note that both the ECtHR and British courts confirmed her right to manifest religion

⁷¹Opinion of AG Sharpston, para. 102 (arguing that in case of Mrs. Bougnaoui the requirement not to wear a headscarf when in contact with customers was not related to the performance of professional duties and therefore could not be considered as a 'genuine and determining occupational requirement'.)

⁷²The genuine and determining occupational requirement corresponds with the concept of *bona fide* occupational qualifications under in Title VII of the US Civil Rights Act of 1964, which requires that a particular characteristics used for job description are immutable. The *bona fide* occupational qualification exception was successfully applied by Hooters (often sarcastically called a "breastaurant") whose female waitresses ("Hooters girls") are a recognizable brand mark.

⁷³In the US, dress codes or hygienic requirements are considered as conduct rules, which may justify unequal treatment (disparate impact) of particular employees provided that they are job-related and necessary for the employment in question.

⁷⁴Interestingly, in this case Muslim women could be compared to both men and women of different faith whose manifestation of religious views can be more "discrete." Jewish men or Sikhs who wish to wear religious headgear would be perhaps similarly disadvantaged like Muslim women.

⁷⁵Notably, the Belgian courts consistently found that a lay-off of an employee who insisted on wearing the Islamic veil at work does not violate the principle of equality for the reason that it is justified by the objective to preserve the company's image. See decisions of the Labour Court of Appeal in Antwerp, 23 December 2011; Labour Court of Appeal in Brussels, 15 January 2008 and Labour Tribunal in Brussels, 15 May 2015.

⁷⁶*Eweida and Others v. the United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10, judgment of 15 January 2013.

in the workplace.⁷⁷ Moreover, the ECtHR and British courts also recognised that a private company has a legitimate interest to secure its neutral image.⁷⁸ Yet, this finding does not mean that the protection of the neutral image always prevails over the employee's right to manifest religious views in the workplace. In principle, to pass a judicial review it does not suffice that a policy serves a legitimate interest. It is also required that the adopted policy is proportionate.

Therefore, the key element in the analysis of justifications based on the neutral image of a company is the assessment of necessity and proportionality of the adopted measures. If the employer does not present other objective reasons related to the job specification (like health and safety),⁷⁹ national courts need to assess the seriousness of self-definition as a religiously-neutral company⁸⁰ and the impact of a particular religious symbol on the job performance.⁸¹

5 The concept of reasonable accommodation

The concept of reasonable accommodation describes the obligation to provide specific benefits to individuals distinguished by their protected characteristics or needs. Belonging to such categories are persons with child-care obligations,⁸² persons with disabilities, and members of religious groups. The duty to accommodate was first established in the Americans with Disabilities Act⁸³ that served as a drafting inspiration for Art. 5 of Directive 2000/78/EC which stipulates that “employers shall take appropriate measures, where needed in a particular case, to enable a person with a

⁷⁷ Clearly, a different conclusion would mean that the manifestation of religious views is entirely confined to the private sphere.

⁷⁸ *Eweida*, para. 93 (“the national judges at each level agreed that the aim of the code was legitimate, namely to communicate a certain image of the company and to promote recognition of its brand and staff.”) Still, a company could not legitimately promote an image which “blatantly at odds with the fundamental values of the EU” – see opinion of AG Kokott in *Achbita*, para. 89.

⁷⁹ *Chaplin v. the United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10, judgment of 15 January 2013. In this case, a public hospital ban on wearing jewellery of a particular kind, which included Christian crosses, was justified on health and safety grounds. See also opinion of AG Sharpston in *Bouganoui*, para. 99.

⁸⁰ In contrast, the seriousness of religious beliefs of individuals should be assumed. Still, a judicial inquiry about the sincerity of religious views and the centrality of a particular religious practice for the adherents to that religion raise difficult problems related to the determination of the individual costs of foregoing such practice.

⁸¹ In *Eweida*, it was decisive that the Christian cross was “discrete” and did not prevent her from the effective performance of her duties. Nor was there any evidence of the interference with the rights of others.

⁸² *Issacharoff/Rosenblum* [13], p. 2154.

⁸³ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 328 (2000). Title I, § 102(b), subsection (5) provides that not making reasonable accommodation, as well as denying employment based on the need to make reasonable accommodation constitutes discrimination. Employers often experience problems with the adequate assessment of a request for accommodation, as well as with the determination of effective accommodation, the scope of necessary adjustments, and the meaning of “undue hardship.” In fact, a person with a disability may also request modifications of a dress code or hygiene requirements which the employer will have to accommodate, unless the dress code or hygiene requirement is necessary for the job at issue.

disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.”⁸⁴

Currently, EU law explicitly acknowledges the duty to provide reasonable accommodation only with regard to persons with disabilities.⁸⁵ In addition, Art. 2 (c) and (d) of the UN Convention of Rights of People with Disabilities lays out similar obligations, albeit broader in scope than the field of employment and occupation.⁸⁶ The CRPD clarifies that discrimination on the basis of disability “includes all forms of discrimination, including denial of reasonable accommodation,” while reasonable accommodation “means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”

In general, the prohibition of discrimination and the duty to provide reasonable accommodation serve the same goal of creating equal opportunities. Yet, the principle of non-discrimination focuses on social distribution, while the requirement of accommodation primarily serves de-commodification. For this reason, its tension with market competitiveness and efficiency is even greater.⁸⁷ In practice, the duty to accommodate poses a difficult question how to respond to a request for effective accommodation against the “undue hardship” or the “disproportionate or undue burden” defence. For some authors, accommodation does not belong to the anti-discrimination law because it denotes the right to a special treatment provided that it does not generate unreasonable costs.⁸⁸ Other authors contend that employers routinely accommodate persons who are structurally advantaged.⁸⁹ Therefore, they defend the duty to accommodate persons belonging to certain protected categories by the need to correct unconscious biases towards these groups.

In the context of EU anti-discrimination law, it is not clear whether the duty to accommodate shall apply only with regard to a particular category like disability or religion, or construed as a general duty to accommodate diversity. It is also unclear whether private employers should accommodate the needs of (potential) employees which are not resulting from immutable characteristics or mandatory religious commandments but personal choices. In any case, it could be argued that the inclusion

⁸⁴Joined cases – C-335/11 *HK Danmark, acting on behalf of Jette Ring* and C-337/11 *HK Danmark, acting on behalf of Lone Skouboe Werge*, ECLI:EU:C:2013:222 (finding that “a reduction in working hours may constitute one of the accommodation measures” and referring the assessment to the national court whether it represents a disproportionate burden on the employer in the circumstances of the case.)

⁸⁵In comparison, some national laws recognise the duty of reasonable accommodation with regard to religion. Also, Title VII of the Civil Rights Act explicitly provides that a denial of reasonable accommodation with regard to religion constitutes a disparate treatment.

⁸⁶The UN CRPD was ratified by the EU in 2011 as a mixed agreement which binds only the EU institutions and Member States which are parties to the Convention.

⁸⁷*Somek* [20].

⁸⁸*Kalman* [14], p. 837.

⁸⁹*Sturm* [22].

of reasonable accommodation in the interpretative framework of the EU directives is necessary to ensure the effective protection against structural discrimination. Hence, it could be viewed either as a positive obligation, which corresponds to the concept of concrete individual rights pertaining to the positive status, or the element of justification regarding unequal treatment.

Following the second view, it could be argued that private employers should be able to justify employment decisions in terms of necessity, which is a separate stage in the proportionality analysis. A specific job requirement or policy may pass the proportionality test only when it serves a legitimate interest and is necessary and proportionate. The necessity criterion means that no alternative, less burdensome measures are available to the particular employer that could effectively serve the same aim. The necessity test imposes on the employer a burden of showing that less burdensome alternatives have been considered but nevertheless rejected as not effective or excessively costly.

For the purpose of the proportionality analysis it is essential that, in order to justify the employment policy, the employer involves in an informal process of communication with the potential employee to identify the existing alternatives. In the opinion of AG Sharpston, the employer and employee need to “explore the options together in order to arrive at a solution that accommodates both the employee’s right to manifest his religious belief and the employer’s right to conduct his business.”⁹⁰ Yet, it is the employer who carries the duty of justification of his decisions in terms of necessity. Still, it is a question for the Court whether the employer may simply defend its policy on the basis of a specific job requirement related to the performance of essential duties, or has more far-reaching obligation to justify a denial of reasonable accommodation especially if the job requirement appears to be unnecessarily exclusionary towards minority groups.

To sum up, the current EU anti-discrimination law is silent on the duty to accommodate religion. However, it could be established by the Court as a mandatory part of the justification analysis. While perusing the necessity criterion in the proportionality review, courts could inquire as to whether the employer actually considered less restrictive measures that would adequately respond to special needs of potential employees. Moreover, the duty of reasonable accommodation implied in the necessity test would also make the employer involve in a meaningful dialogue with the potential employee in order to objectively assess the economic costs of accommodation.

6 The evolving model of EU anti-discrimination governance

The Islamic veil controversy shows that courts may experience a practical difficulty with the assessment of economic costs (and benefits) of non-discrimination which is necessary to ascertain whether religious accommodation is not too burdensome for a company. It also demonstrates that there is a need to shift the focus from norm compliance to management and flexible standards.⁹¹ In fact, it is already happening, for

⁹⁰Para. 128.

⁹¹See Opinion of AG Kokott in *Achbita*, para. 99 (“In a case such as this, the proportionality test is a delicate matter in the context of which the Court of Justice, following the practice of the ECtHR in relation

EU anti-discrimination law is evolving through the process of solving cases, which establish only general guidelines for those who need to comply with the principle of non-discrimination.⁹²

In the EU, the principle of non-discrimination together with anti-discrimination directives form a multi-level normative framework, which leaves a significant margin of discretion for management. In result, there is “a dynamic and reciprocal relationship between judicially elaborated general legal norms and workplace-generated problem-solving approaches, which in turn elaborate and transform the understanding of the general norm.”⁹³ Yet, the dynamics of this process depends on the effective communication between courts, managers and equality stakeholders (equality bodies, professional networks, trade unions, NGOs).

The judicial deference to pragmatic local solutions is evident also in national courts – for example, Lord Bingham in *Begrum* emphasised that it is not for courts “(…) to rule whether Islamic dress, or any feature of Islamic dress, should or should not be permitted in the schools of this country (…)” and that “the justification must be sought at the local level and it is there that an area of judgment, comparable to the margin of appreciation, must be allowed to the school.”⁹⁴ This approach may also suggest that courts lack adequate tools to analyse the current patterns of discrimination or lack legitimacy to impose their own solutions for religious accommodation even in the public school settings.⁹⁵ At the same time, the effective protection against discrimination also means that structural discrimination should be provided with judicial remedies. Therefore, courts should not give the managers a free hand, but insist on the adoption of procedural and substantive measures aimed to accommodate diversity in their business practices.

In the light of these developments, the future of EU anti-discrimination law seems to depend on the judicial response to the problem of structural discrimination and their endorsement of diversity. In this context, the shift from norm compliance to management needs to be seen as a consequence of the normative deficiency of anti-discrimination law and plurality within the EU constitutional framework. The EU as a flexible constitutional polity necessitates tailor-made solutions taking into account the specificity of public and private settings, national identities, and the type of an

to Art. 9 ECHR and Art. 14 ECHR, (...) should grant the national authorities, in particular the national courts, a measure of discretion which they may exercise in strict accordance with EU rules. In this regard, the Luxembourg Court does not necessarily have to prescribe a solution that is uniform throughout the European Union. Rather, it would be sufficient, in my opinion, for the Court to indicate to the national court all of the material factors that it must take into account in carrying out the proportionality test but otherwise to leave to that court the actual task of striking a balance between the substantive interests involved.”)

⁹²Compare a checklist of factors to be taken into account in the assessment of the employer’s policy suggested by AG Kokott (para. 140) or the margin conditions rejected by AG Sharpston as disproportionate (para. 130).

⁹³*Sturm* [21], p. 479.

⁹⁴*Begum, R (on the application of) v. Denbigh High School* [2006] UKHL 15 (22 March 2006).

⁹⁵Samuel Bagenstos pessimistically notes that “[c]ourts lack the local knowledge to develop prescriptive rules that adequately account for varied workplace conditions, but employers often have interests that are in conflict with workplace equality norms. Under these conditions, how can a dialogue between courts and employers ever be successful?” *Bagenstos* [3], p. 27.

industry or business.⁹⁶ Still, a side effect of this shift from norm compliance to management could be re-nationalisation of anti-discrimination law and reinforcement of the existing hierarchies, leading to even greater fragmentation of this field.

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⁹⁶Shaw [19], p. 339.